87-1487

Supreme Court, U.S.
FILED
MAR 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et. al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:
ANDREW J. SCHWARTZMAN
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036

HENRY GELLER
Counsel of Record
DONNA LAMPERT
DANIEL R. OHLBAUM
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7360

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

Two issues rest on the outcome of this case: (1) whether, in regulating the carriage of television broadcast signals by cable television systems, the Federal Communications Commission has impermissibly discarded the Congressional policy of preserving free local off-the-air television service and (2) whether regulation of cable systems' use of broadcast signals in a manner reasonably related to the achievement of goals decreed by Congress in the Communications Act of 1934 is valid under the First Amendment.

PARTIES BELOW

The petitioner here, Office of Communication of the United Church of Christ, was an intervenor below. Respondents Federal Communications Commission and United States of America were respondents below. Century Communications Corporation, Richard S. Leghorn, Hubbard Broadcasting Inc., Chasco Cablevision, Ltd., Clearview Cablevision Associates II, Columbia Associates, L.P., Daniels & Associates, Inc., Landmark Cablevision Associates, Monmouth Cablevision Associates, Masada Communications, Inc., National Cablesystems, Inc., OCB Cablevision, Inc., Ocean Associates, Riverview Cablevision Associates, St. Charles CATV, Inc., and United Cable Television Corp. were petitioners below. Also intervenors below were: Independent Television Stations, Inc., Spanish International Communications Corp., Univision, Inc., The National Association of Broadcasters, Lincoln Broadcasting Co., National Cable Television Association, *et al.*, Corporation For Public Broadcasting, National Association of Public Television, Public Broadcasting Service, National Broadcasting Co., Inc., and Spanish International Communications Corp.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
1. The Court below erred in not finding that the Commission's new policy contravened the Communications Act	11
2. The constitutional premises of the Commission's action are incorrect and, unless reversed, render infeasible any must carry rule to fulfill the Congressional mandates	17
CONCLUSION	23
APPENDIX (separately bound)	
Opinion of the United States Court of Appeals for the District of Columbia Circuit	1a
Supplemental Order of the Court of Appeals of January 29,1988	29a
Report and Order of the Federal Communications Commission	32a
Memorandum Opinion and Order of the Federal Communications Commission denying reconsideration	205a
Judgment of the Court of Appeals	331a

TABLE OF AUTHORITIES

CASES: Page

Black Hills Video Corporation v. *FCC*, 399 F.2d 65 (8th Cir. 1968) 18-19,23

Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 23

Carter Mountain Transmission Corp. v. *FCC*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963) 4,8,15

City of Los Angeles v. *Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986) 7,22

City of Renton v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986) 21

Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) 21

FCC v. *League of Women Voters of California*, 468 U.S. 364 (1984) 21

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 16

FCC v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) 14

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 6,20

Midwest Video Corp. v. *FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd* on other grounds, 440 U.S. 689 (1979) 19

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 18

Quincy Cable TV, Inc. v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. NAB* v. *Quincy Cable TV, Inc.*, 106 S.Ct. 2889 (1986) 6-7,15-16,20-21

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 18,19-20

United States v. *Albertini*, 472 U.S. 675 (1985) 21

United States v. *O'Brien*, 391 U.S. 367 (1968) ... 6,20-21

Table of Authorities Continued

Page

United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 11,15,16,18,23

STATUTES:

17 U.S.C. § 111(c)(1) 4

Cable Communications Policy Act of 1984, 98 Stat. 2780, 47 U.S.C. § 521, *et. seq.*:

Section 531 22

Section 532 22

Section 544(f)(2) 11

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et. seq.*:

Section 303(s) 11

Section 307(b) 11

Section 330(a) 11

FEDERAL COMMUNICATIONS COMMISSION REGULATIONS:

47 CFR § 76.56 12,17

47 CFR § 76.64 12

47 CFR § 76.66 13

AGENCY DECISIONS AND REPORTS:

Cable Television Report and Order, 36 F.C.C. 2d 143 (1972), *reconsideration denied*, 36 F.C.C. 2d 326 (1972), *aff'd sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975) 4-5

First Report and Order in Docket No. 14895, et al., 38 F.C.C. 683 (1965) 5

Memorandum Opinion and Order, 55 Rad. Reg. 2d (Pike & Fischer) 1365 (1984) 6

Notice of Inquiry and Notice of Proposed Rulemaking, 50 Fed. Reg. 48232 (1985) 7

Table of Authorities Continued

	Page
Second Report and Order in Docket No. 14895, et al., 2 F.C.C. 2d 725 (1966)	5
MISCELLANEOUS:	
Broadcasting Mag., January 11, 1988, p.37	22
Communications Daily, Jan. 12, 1988, p. 3	16
H.Rept. No. 98-934, 98th Cong., 2d Sess., p.70	11
S.Rept. No. 98-67, 98th Cong., 1st Sess., pp.11-12	11
Washington Post, December 12, 1987, at A7	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. _____

OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et. al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 835 F.2d 292. The Report and Order of the Federal Communications Commission (App. 32a) is reported at 1 F.C.C. Rcd 864, 61 Rad. Reg. 2d (Pike & Fischer) 792. The Commission's Memorandum Opinion and Order denying reconsideration (App. 205a) is reported at 2 F.C.C. Rcd 3593, 62 Rad. Reg. 2d (Pike & Fischer) 1251.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1987 (App. 331a).* The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

First Amendment to the Constitution of the United States:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et. seq.* are as follows:

Section 303(s) (47 U.S.C. § 303(s)):

> Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

Section 307(b) (47 U.S.C. § 307(b)):

> In considering applications for licenses, and modifications and renewals thereof, when and

---

* The court of appeals had jurisdiction pursuant to section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and 28 U.S.C. § 2342.

> insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 330(a) (47 U.S.C. § 330(a)):

> No person shall ship in interstate commerce, or import from any foreign country into the United States, for sale or resale to the public, apparatus described in paragraph (s) of section 303 of this title, unless it complies with rules prescribed by the Commission pursuant to the authority granted by that subsection: *Provided*, That this section shall not apply to carriers transporting such apparatus without trading in it.

STATEMENT OF THE CASE

This petition involves questions of the statutory and constitutional standards governing regulation by the Federal Communications Commission (Commission) of the carriage of broadcast signals by cable television systems. Cable television today is a hybrid service. Cable systems deliver to their subscribers the signals of television broadcast stations, both local and distant.[1] The modern cable system also distributes non-

---

[1] Cable systems obtain local signals off-the-air with a high antenna. They obtain distant signals through use of tall towers, microwave radio relay facilities or, most commonly today, a communications satellite. Congress in 1976 gave cable television sys-

broadcast cable programs, usually obtained from a distant source via a communications satellite, and engages in some local program origination. This case deals with cable's first and traditional role of distributing television broadcast signals.

1. The must carry rule; its origin.

Until 1975, cable's function was almost entirely to bring television broadcast signals to its subscribers. This supplied added diversity, particularly in the smaller television markets. However, the Commission found that if a cable system failed to carry the local station in such markets, it would imperil local service, and the public interest would be adversely affected. In the lead case, *Carter Mountain Transmission Corp.* v. *FCC*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963), involving the sparsely populated Riverton, Wyoming, area, the Commission was sustained in refusing to grant a microwave relay license to serve a cable system (then called community antenna television) unless it carried the sole local station. The Commission had concluded that the cable system's failure to carry the local station would result in 43,000 rural homes (out of 74,000 homes in the market) being left without any television service at all.

Upon the basis of this and other experience, the Commission adopted rules directly applicable to cable systems requiring them to carry local stations—the must carry rules. The main basis of the rules is thus to assure that local stations ". . . are not denied ac-

---

tems a compulsory license, at rates fixed by law, to retransmit broadcast signals they are authorized by the Commission to carry. See 17 U.S.C. § 111(c)(1).

cess to the audience they are licensed to serve . . . ."[2] This protects the economic viability of local stations and the availability to the public of local service; it also insures that no local station is placed at a competitive disadvantage vis-a-vis distant signals or such local stations as the cable system voluntarily carries.[3]

2. Must Carry in the period 1975-1985; the Quincy case.

The must carry rules continued in force through the 1970s and the early 1980s. The nature of cable changed. Cable capacity increased and, in addition to the carriage of broadcast signals, cable systems now presented a substantial number of non-broadcast programs delivered to the cable system by the new satellite technology (e.g., Home Box Office, Cable News Network). This resulted in explosive cable growth, especially in the major markets, by systems with much

---

[2] *Cable Television Report and Order*, 36 F.C.C. 2d 143, 173 (1972), *reconsideration denied*, 36 F.C.C. 2d 326 (1972), *aff'd sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975).

[3] See *First Report and Order in Docket No. 14895, et al.*, 38 F.C.C. 683, 700-1, 705-06, 713-15 (1965) (*First Report*); *Second Report and Order in Docket No. 14895, et al.*, 2 F.C.C. 2d 725, 734-37, 770-78 (1966). The Commission rejected the notion of relying on an input selector, or "A/B", switch in order to assure local station access to the cable audience. The Commission pointed out that even assuming people retain and maintain outdoor antennas necessary for good reception of the off-the-air signal, "the sheer inconvenience of switching is an obvious deterrent to its use by the subscriber." *First Report*, *supra*, 38 F.C.C. at 702-03.

The A/B switch is installed at the VHF terminals of the television receiver, enabling the subscriber to receive channels 2-13; cable facilities are not attached to the UHF terminals at the back of the receiver.

greater channel capacity. But systems continuing to operate with limited capacity could not carry all the new cable programmers if they were required to carry too many local signals.

In 1984 the Commission denied petitions to eliminate the must carry rules, holding that the increased number of cable subscribers made the potential consequences of non-carriage more significant and that the increasing cable capacity rendered compliance with the rule less burdensome.[4]

Upon review, the D.C. Circuit concluded that the Commission had failed to meet its "heavy burden" of justifying the constitutionality of the must carry rules under the First Amendment. *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434, 1462-63 (D.C. Cir. 1985), *cert. denied sub nom. NAB* v. *Quincy Cable TV, Inc.*, 106 S.Ct. 2889 (1986) (*Quincy*). The court held that broadcast First Amendment standards are inapplicable to cable since the latter does not use the radio spectrum. The court suggested that the must carry rules may well come within the stringent standard applicable to print of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), but asserted that it need not decide whether the rules are more than an "incidental restriction" on speech within the terms of *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968), because the rules also failed the *O'Brien* test in that they had not

---

[4] *Memorandum Opinion and Order*, 55 Rad. Reg. 2d (Pike & Fischer) 1365 (1984). As to reliance instead on the A/B switch, the Commission again said that its "extensive experience" indicated that "even relatively minor receiver/tuner obstacles to reception may create significant impediments to viewing of stations and thus have substantial impact on their economic viability." *Id.*, at 1367.

been shown to serve a substantial governmental interest and were " 'grossly' overinclusive." *Id.*, 768 F.2d at 1460. The court concluded, however, that its decision did not foreclose the agency from adopting new must carry rules consistent with the *O'Brien* requirements.

A petition for a writ of certiorari filed by the National Association of Broadcasters (NAB) was held by the Court until one week after its decision in *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986),[5] and then denied.

In 1985, the Commission commenced a rulemaking proceeding on must carry.[6] During the proceeding, the NAB reached an agreement with the National Cable Television Association,[7] and submitted it to the Commission. Petitioner opposed the agreement as not serving the public interest, and urged that, so long as cable made use of broadcast signals, the Commission could, and indeed must, impose certain basic car-

---

[5] This case presented the issue of whether a city franchising authority could, consistent with the First Amendment, grant a *de facto* exclusive cable television franchise. The Court held that each medium must be assessed for First Amendment purposes by standards suited to it, and that there was a need to resolve the constitutional issues in the *Preferred* situation in a concrete, full factual setting. On this "narrower ground" (*Id.*, at 2036), it remanded the case to obtain such full facts.

[6] *Notice of Inquiry and Notice of Proposed Rulemaking*, 50 Fed. Reg. 48232 (1985).

[7] The agreement exempted all cable systems with 20 or fewer channels from must carry requirements; other systems would have to devote up to 25% of their capacity to such requirements, but with complete discretion as to the signals to be carried. *Report*, par. 92 (App. 81a).

riage requirements in line with clear Congressional mandates: (1) carriage of local stations in sparsely populated areas (the *Carter Mountain* situation); (2) in other markets, where cable has limited channel capacity, only those stations in need of carriage (i.e., the local noncommercial station(s), community stations, and UHF independent stations); and (3) where cable has no channel capacity problem, all local signals on a non-discriminatory basis.

In its 1986 decision,[8] and 1987 opinion denying reconsideration,[9] the Commission rejected the approach urged by petitioner.[10] It ignored the critical consideration that cable is enmeshed with the broadcast system, carrying both distant and local signals.[11] Instead, it said that it was adopting a wholly new approach in light of cable's tremendous growth—"that it is no longer appropriate . . . to protect local broadcast television service from competition with [the coequal] cable service." *Report*, par. 119 (App. 97a). The Commission also relied heavily upon the constitutional considerations set out in *Quincy*. Indeed, it stated that cable is akin to print and found that "stringent" First Amendment standards apply rather than the standards applicable to broadcasting. *Report*, pars. 120, 171, 184 (App. 97a, 131a, 141a). The Commission therefore stated that it would afford maximum dis-

---

[8] *Report and Order* (*Report*), 1 F.C.C. Rcd 864. (App. 32a.)

[9] *Memorandum Opinion and Order* (*Reconsideration*), FCC 87-105, 2 F.C.C. Rcd 3593, summary in 52 Fed. Reg. 17574 (May 11, 1987). (App. 205a.)

[10] *Report*, par. 177 (App. 135a); *Reconsideration*, pars. 40-49 (App. 228a-233a).

[11] See *Report*, at notes 123, 134, 143 (App. 136a, 139a, 141a).

cretion to the cable operator to choose programming of the greatest interest to its subscribers. See, e.g., *Report*, pars. 119, 120, 128, 177 (App. 97a-98a, 102a, 135a).

However, in light of the perceived expectations of subscribers of continued cable carriage of all local signals, an expectation the Commission said was built up under the prior must carry regime, and the record before it showing that some local broadcast signals had been, and would be, dropped,[12] the Commission decided upon an interim policy. It adopted must carry rules based largely on the industry agreement, but "sunset" the requirement after five years. Furthermore, during that period and continuing thereafter, the cable operator is to engage in a "consumer educational program" as to the sunset and the possible need for an "A/B" switch and an antenna to receive local signals not carried by the cable.[13] The switch was the focus of the new program to "maximize consumers' viewing choices." *Report*, pars. 121-134, 136, 140-42, 160-68 (App. 98a-105a, 109a, 112a-114a, 125a-130a).

Several cable operators sought review of the new rules, arguing that they also were unconstitutional. Petitioner intervened, urging reversal and remand for the failure of the Commission to follow its approach.

The lower court, in an opinion by Chief Judge Wald joined by Judges Mikva and McGowan, rejected

---

[12] *Report*, par. 131, n. 159 (App. 104a, 149a); *Reconsideration*, par. 59 (App. 239a).

[13] *Report*, par. 136 (App. 109a-110a). The Exhibit hereto reproduces a non-record notice sent to its subscribers by a cable system pursuant to the consumer education requirements.

petitioner's position as foreclosed by *Quincy*. (See App. 16a, n.4.) The court held that the interim must carry rules still failed to meet the *O'Brien* requirements because the need for tne rules ". . . is more speculative than real," and the new regulations, in view of their lengthy (five year) duration, are too broad. (App. 18a, 28a.) In a supplemental Order of January 29, 1988 the court made clear that it was striking down only the interim must carry rules and not the Commission's consumer education program (App. 29a).

REASONS FOR GRANTING THE WRIT

With its rapidly increasing penetration of American television households (i.e., over 50% today), cable television is becoming the gateway for television programming. Cable thus remains enmeshed with television broadcasting, extensively carrying both local and distant television signals. Indeed, cable, in effect, tells its subscribers that they are getting what is most popular in television. If the cable operator fails to carry a local television station, such as one in a rural area or a new UHF independent or public broadcasting station, it drastically affects those stations. It also skews the clear Congressional goals: the maintenance of local off-the-air service and promotion of UHF and public television. Yet the Commission has now proclaimed that it is indifferent to these goals.

The Commission is much influenced in its decision by constitutional concerns for allowing the cable operator maximum discretion, erroneously holding that regulation of cable television's carriage of broadcast signals does not come within established constitutional

standards applicable to television. The court below refused to correct the agency's errors on these two issues, both of which warrant review by this Court.

1. The court below erred in not finding that the Commission's new policy contravened the Communications Act.

Cable television systems uniformly utilize the signals of television broadcast stations as the core of their program offerings, making cable an indivisible part of an interstate stream of communication. The Commission, therefore, has authority to regulate cable in a manner "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). In doing so, the Commission has the responsibility, *inter alia*, to exercise its regulatory authority so as to preserve "a system of [free] local broadcasting stations. . . . *Id.*, at 174-75. The must carry rules have been the keystone of the exercise of the Commission's attempt to preserve the access of local stations to their full potential audience and to enable them to compete on equal terms. Must carry requirements are particularly critical to the Congressional goals of promoting the development of the UHF portion of the spectrum (necessary for a nationwide television broadcast system) and the use of television for noncommercial purposes. *Id.*, at 174-75.[14]

---

[14] See 47 U.S.C. §§ 303(s), 307(b), 330(a). Congress has recently reaffirmed its dedication to local television service. See S.Rept. No. 98-67, 98th Cong., 1st Sess., pp.11-12; H.Rept. No. 98-934, 98th Cong., 2d Sess., p.70, on the Cable Communications Policy Act of 1984, 47 U.S.C. §544(f)(2).

Paradoxically, the Commission now cites "the changed structure of the overall video market resulting primarily from the emergence of the cable industry as a means for distributing new program services . . ." *Report*, par. 119 (App. 97a),[15] as justification for a new "assessment of the federal interest" and the conclusion that "it is no longer appropriate . . . to protect local broadcast television service from competition with cable service." *Ibid.* Instead, the agency has adopted a new policy designed to maximize cable subscribers' program choices. *Report*, pars. 119, 161 (App. 97a, 126a).

The new "policy," aside from limited "interim" (five year) must carry rules designed to preserve stability while cable subscribers were informed of the new policy,[16] consists entirely of a mandated "consumer education" program to be undertaken by cable systems. *Report*, pars. 135-39 (App. 109a-112a). The essence of this program is a requirement that cable systems notify their subscribers that the system will not be required to carry any broadcast signals beyond five years, that subscribers may purchase and install (through the cable system or otherwise) an A/B switch on their television receivers to receive off-the-air signals not carried by the cable systems (the expense to be borne by the subscriber except for the installation

---

[15] The Commission found that from 1972 to 1986, cable systems had more than doubled, from 2841 systems, passing 17% of homes, to 6844 systems, passing 76% of the nation's homes. Subscribers numbered 22,000,000. Table 1 (App. 106a). Cable penetration by 1986 was 47% of homes, *Ibid.* (App. 106a), rising by 1984 to as much as 57.9% in smaller communities. Table 2 (App. 107a).

[16] Rule §§ 76.56, 76.64 (App. 180a, 314a, 184a).

charge for new subscribers),[17] and that "[i]t may be necessary to use an antenna, in conjunction with an input selector switch, to access broadcast signals available off-the-air and not carried by the cable system. . . ." Rule § 76.66 (App. 316a).

The emphasis throughout the Commission's often murky discussion of its new policy is upon the choice offered cable subscribers; indeed, if:

> a competitive market [does] not lead cable operators to carry all of the television signals that can be received off-the-air in their communities . . . such a result furthers the public interest if cable systems are able to replace an off-the-air signal with a signal from another source for which their subscribers would have a greater preference. Moreover, as long as cable subscribers are aware that they can receive the signal off-the-air, their overall program choices are maximized. (Par. 128, App. 102a.)

While the Commission stated that "[n]oncable subscribers' viewing choices also will be substantially enhanced to the extent that cable subscribers use input selector switches to access all off-the-air broadcasting," *Report*, par. 162 (App. 126a), the Commission

---

[17] The Commission, at the urging of the cable industry, removed requirements adopted in its primary *Report* that cable systems supply and install switches for new subscribers without charge and offer switches to existing subscribers with only an installation charge. Rule § 76.66 (App. 185a, 316a), largely because of the "substantial financial burdens on cable operators." *Reconsideration*, par. 81 (App. 257a). This left the financial burden upon the cable subscribers.

found that "cable subscribers in general currently do not have the antennas in place to provide satisfactory reception of off-the-air broadcast stations that are not carried on their cable systems." *Report*, par. 125 (App. 100a). But the Commission professed no prediction, based upon data before it or anything in its experience as an expert body, that any substantial number of cable subscribers could be expected to pay a sometimes considerable sum for switches and antennas to receive off-the-air stations dropped by a cable system.[18] See *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96-7 (1953).

The stations which are most likely to be dropped are those which are most in need, i.e., new UHF independents, community, and noncommercial stations. Without cable carriage, the Congressional policy of insuring the viability of these needy stations will be in serious jeopardy.

---

[18] Nor does the sudden reliance on the A/B switch excuse this failure to follow Congressional mandates. The Commission several times, and as recently as 1984, stressed that the switch was not effective because of its experience that even minor inconvenience caused major problems for viewers in receiving signals. (*Supra*, note 4, p. 6.) Indeed, the Commission frankly acknowledged that it was now turning to the switch because of its perception of serious constitutional concerns with a permanent must carry rule. *Report*, par. 163 (App. 127a). Most significantly, as stated above, the switch is often useless without an antenna, and the Commission never put itself in a position to know whether cable subscribers, given the usual large "menu" of television signals on the cable, will go to the trouble and expense not only of purchasing and maintaining a switch but also of obtaining the outdoor antenna so often needed for reception of UHF stations like Channel 50 or Channel 32 in Washington, D.C., or the VHF station in Riverton.

The Commission is now saying that if in the *Carter Mountain* situation (*supra*, p. 4) the cable system carries only distant television stations from Denver and not the local Riverton, Wyoming, station, even though that may well leave over 40,000 people without television service, such a result is permissible under the public interest standard of the Communications Act. Or, in Washington, D.C., under the Commission's approach, it is consistent with the Act to have the cable system carry distant television signals and all local stations except, for example, the new UHF station on Channel 50 or the public broadcasting station of Howard University on Channel 32. But this clearly frustrates Congressional goals of promoting UHF and public broadcasting, upon which Congress has spent hundreds of millions of dollars to maintain as an alternative service. See *Southwestern Cable*, *supra*, 392 U.S. at 174-75.[19]

The court of appeals recognized that the "most salient feature of the new rules was that the Commission substantially altered its stated justification for imposing must-carry rules at all. . . ." (App. 9a.) The lower court erred in accepting the Commission's basic change of policy as valid.[20] The Commission's new

---

[19] Thus, if a cable system with limited capacity chooses to become enmeshed with television broadcasting, it must meet the Congressional directive as to needy rural local service, public television, and UHF independent service, and then it can carry all other broadcast signals it desires (expanding capacity if necessary). Similarly, a modern system with no capacity problems, when it drops any local station, is simply discriminating against the station, and putting it at a competitive disadvantage.

[20] The court below thought that its earlier decision in *Quincy Cable TV, Inc.* v. *FCC*, *supra*, 768 F.2d 1434, foreclosed any

policy baldly repudiates the Congressional policy of preserving and promoting free local service recognized by this Court in *Southwestern Cable, supra*, 392 U.S. at 174-75.[21]

---

argument that must carry rules are "permanently needed to safeguard the diverse programming generated by protecting local broadcasts," and stated that the Commission had "conceded" that A/B switches and antennas will ultimately insure such diversity. (App. 16a-17a, n.4.) But *Quincy* foreclosed nothing; indeed the *Quincy* panel merely found that the Commission, in adopting its earlier must carry rules, had " 'failed to put itself in a position to know' " the need for protection of local broadcast signals (*Id.*, at 1457), and it specifically stated that "it is for the Commission and not this court to ascertain which broadcasters or classes of broadcasters are sufficiently at risk to warrant protection." *Id.*, at 1462. The Commission was necessarily left free by the *Quincy* panel to do so. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). And, of course, the Commission could not "concede" that its new policy would insure diversity for the non-cable subscribing public.

[21] The D.C. Circuit also found it purely speculative that local stations will not be carried. (App. 25a.) But not all local public television or new UHF stations are carried. Thus, the Commission found, on the basis of "evidence in the record[,] that some cable systems have ceased to carry individual broadcast stations, refused to carry new stations, and/or requested payment for carriage of stations." *Report*, par. 131 (App. 104a); *Reconsideration*, par. 59 (App. 239a). The Commission further took into account that many cable operators "thus far may have been hesitant to act" as to carriage of local stations because of appeals and Congressional interest. *Ibid.* The Commission specifically noted the appeal of NCTA leaders to members that they continue to carry local signals until the matter is settled. *Ibid.* That attitude continues today. See *Washington Post*, December 12, 1987, at A7 ("Noting that the decision [in *Century Communications*] might be appealed, [NCTA] advised members to behave for the time being as if the rule were still in effect"). And *Communications Daily*, Jan. 12, 1988, p. 3, reported that 196

In sum, the Commission, jettisoning the bedrock Congressional goal of protecting local television service, has put free local television service in the hands of its chief competitor. No claim of agency discretion will support this flouting of Congress' will. The importance of this issue would be apparent even if this Court had not already declared that the Commission's responsibility "for the orderly development of an appropriate system of local television broadcasting" was a matter whose "significance . . . can scarcely be exaggerated. . . ." *Id.*, at 177.

2. The constitutional premises of the Commission's action are incorrect and, unless reversed, render infeasible any must carry rule to fulfill the Congressional mandates.

The Commission's decision to abandon must carry requirements was largely impelled by concern "that the First Amendment rights of cable operators not be abridged," rights it saw as akin to those of publishers of print media. *Report*, par. 120 (App. 97a). Thus, the Commission stated that no permanent rules are "sustainable" (*Report*, par. 138, App. 111a), and turned to the much rejected A/B switch because of constitutional concerns. *Report*, pars. 163-64 (App. 127a). Even as to the interim rule, the Commission afforded no must carry relief for needy local service in rural areas[22] because of "the strong constitutional concerns. . . ." *Id.*, at par. 171 (App. 131a). It found that there must be maximum discretion to the cable

---

noncommercial stations have been dropped by cable systems since the must carry rules were deleted.

[22] These are areas where there are systems with 20 or fewer channels, and thus exempted from all interim must carry requirements. See Rule § 76.56 (App. 180a).

operator to choose programming, including broadcast signals, of the greatest interest to its subscribers, despite considerations of the needs of UHF or public television stations as against powerful VHF stations. *Most important, the Commission found, contrary to the urging of petitioner, that the regulation of cable carriage of broadcast signals does not come within the constitutional First Amendment standards applicable to broadcast regulations, and the court below failed to reverse this critical holding.*

It is true today as it was forty-five years ago that, "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation" which, if valid under the Communications Act, is not a denial of free speech. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969) (sustaining the right of the government to require that broadcasters open their facilities to divergent viewpoints on public issues). Thus, no First Amendment issue was even raised in *United States* v. *Southwestern Cable Co., supra.*

As the eighth circuit said in *Black Hills Video Corporation* v. *FCC*, 399 F.2d 65, 69 (8th Cir. 1968), sustaining must carry rules against attack under the First Amendment:

> The Commission's effort to preserve local television by regulating CATVs [as cable was originally called] has the same constitutional status under the First Amendment as regulation of the transmission of signals by the

> originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the air waves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service.

Must carry rules simply hold that cable, if it chooses to become enmeshed with the broadcast system, must not—in its carriage of broadcast signals—undermine Congressional goals by destroying or crippling large parts of the broadcast service it feeds upon. "The public interest in preventing such a development is manifest." *Black Hills Video Corporation, supra*, 399 F.2d at 69.[23]

Nor do must carry rules limit the cable operators' free expression of ideas.[24] This Court's characterization of fairness requirements applicable to broadcasting, which it sustained against constitutional attack, is pertinent here:

> There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his

---

[23] *Black Hills, supra*, deals directly with must carry rules. In *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025 (8th Cir.1978), *aff'd* on other grounds, 440 U.S. 689 (1979), the eighth circuit expressed doubts on, without deciding, the constitutionality of rules requiring access on cable systems' channels not used to transmit television broadcast signals.

[24] In adopting interim must carry rules the Commission recognized that must carry requirements are content-neutral, *Reconsideration*, pars. 64-66 (App. 243a-245a).

> own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 396 (1969). Indeed, a cable system can carry any broadcast signals it desires, simply by expanding its channel capacity. It was plainly erroneous, therefore, for the Commission to term must carry rules "a stringent form of regulation that intrude on cable operators' free speech rights," and to proceed on the basis that "cable's First Amendment rights are subject to a stringent review. . . ." *Report*, pars. 138, 184 (App. 110a-111a, 141a).

The Commission's refusal even to consider permanent must carry rules because of its misjudgment of First Amendment concerns was apparently premised largely upon the decision of the D.C. Circuit in *Quincy*, *supra*. That decision refused to follow the "broadcast" mode of review of First Amendment claims, 768 F.2d at 1448-50, and strongly suggested that the exacting standard of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), adopted for review of infringements of newspapers' editorial judgment, should be applied to must carry rules. See 768 F.2d at 1452-54. The *Quincy* court believed that cable "shares attributes of the more traditional press," 768 F.2d at 1450, and doubted that the burden on speech of must carry rules is "incidental" and thus reviewable under *United States* v. *O'Brien*, 391 U.S. 367 (1968). 768 F.2d at 1450-54. Thus, while it nonetheless

purported, and no doubt intended, to apply *O'Brien*, the *Quincy* court struck down the must carry rules as constitutionally infirm by repeatedly referring to a "heavy burden" of justification which the rules failed to meet, 768 F.2d at 1457, 1459, 1463, a test nowhere appearing in *O'Brien*, which required only that an incidental burden on speech be shown to further an important or substantial governmental interest, 391 U.S. at 377.[25]

We believe the Commission's judgment was skewed by the above *dictum* and by this "toughening" of the *O'Brien* standard in *Quincy*. Certainly the Commission rejected permanent must carry rules out of hand as "unsustainable" not only because of its disinclination to preserve free television in the face of growing cable service but also because it tended to view cable as akin to the printed press. But properly founded and limited permanent must carry rules[26] are sustainable under the "broadcast" standard which, we urge, is properly applicable and which the Commission and the court of appeals both refused to adopt.[27]

---

[25] See also *City of Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States* v. *Albertini*, 472 U.S. 675 (1985).

[26] See *supra*, at 7-8, for the rules urged by petitioner.

[27] In *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984), the Court, after noting that it traditionally followed a different approach in evaluating First Amendment issues in the broadcast field, did assess a provision of the Communications Act suppressing speech (i.e., proscribing editorializing by noncommercial stations) under a "substantial interest" and "narrowly tailored" test. See particularly *Id.*, at 374-381.

The rules suggested by petitioner would clearly pass muster under this analysis also. Such rules, along the lines suggested,

The court below is plainly wrong in stating that its ruling is "narrow" and that the Commission remains free to try again to devise a sound must carry rule. (App. 28a.) The Commission's incorrect constitutional holding will continue to control this situation, and no permanent must carry rules are permissible under that ruling.[28] Clearly, only by resolving the First Amendment issue will it be practicable to fashion policy in this important area consistent with Congressional desires in the Act.

The constitutional issue is limited to this one facet—cable's carriage of broadcast signals and whether the Commission can impose reasonable regulation as to priority of such carriage to meet specific Congressional goals in the broadcast field. This case does not present the constitutional issue of the First Amendment's applicability to the non-broadcast aspects of cable's operation—*de facto* exclusive franchising; requirements of public or leased channel access under local franchises or the Cable Communications Policy Act of 1984.[29] This issue remains for another day and case, on the concrete factual record required by *City*

---

would be within the agency's authority, serve an important and substantial governmental interest, have only incidental impact on speech (readily remedied by expanding the system's capacity), and be narrowly tailored to accomplish the governmental interest.

[28] It could not be seriously argued that a newspaper could be required to set aside a substantial portion of its capacity for a governmentally prescribed purpose. Significantly, the Chairman of the Commission has just stated his doubt that any rules are constitutionally permissible. See *Broadcasting Mag.*, January 11, 1988, p.37.

[29] See 47 U.S.C. §§ 531, 532.

of Los Angeles v. *Preferred Communications, Inc.*, *supra*.

Correspondingly, however, resolution of the above issue will not control this case. Assuming that the newspaper model does govern cable franchising or access requirements, that still would not mean that the First Amendment broadcast regulatory standard does not govern as to cable's carriage of broadcast signals. That issue thus stands on a different footing and is fully ripe for resolution now.

CONCLUSION

The decision below, failing to reverse the Commission action, undermines clear and important Congressional goals, only recently stressed by the Congress.[30] It renders nugatory the decisions of this Court in *Southwestern Cable*, *supra*, and *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984)[31] and conflicts with the correct decision of the eighth circuit in *Black Hills*, *supra*. The petition for certiorari should be granted.

---

[30] See note 14, *supra*, p. 11.

[31] The Court there held that state rules requiring cable operators to delete alcoholic beverage commercials from broadcast signals they were carrying were invalid under the supremacy clause, because the Commission's regulation of broadcast signal carriage by cable systems, and specifically its must carry rules, established the existence of an "important and substantial" federal interest justifying preemption. *Id.*, at 713-16.

Respectfully submitted,

HENRY GELLER
Counsel of Record
DONNA LAMPERT
DANIEL R. OHLBAUM
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7360
Counsel for Petitioner

Of Counsel:
ANDREW J. SCHWARTZMAN
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036

March 1988

EXHIBIT

EXHIBIT

TELEVISION SIGNAL AND INPUT SELECTOR SWITCH AVAILABILITY NOTICE

The FCC, in 1986, adopted new requirements concerning cable system carriage of local television broadcast stations. Beginning June 10, 1987, a cable system has been required to carry one or more local broadcast stations, but not necessarily all such stations, until June 10, 1992. After that date, carriage of local broadcast stations will be at the discretion of the cable operator. As a result, at this time or at a later date, you may not be able to receive all local television stations over your cable system. At this time, MetroCable is not carrying the following local broadcast stations: WTTX Ch.-66, WFTY Ch.-50 and WNVC Ch.-56.

To ensure that you will retain the capability of receiving all of the broadcast stations that are available off the air, which might not be carried on the cable system, either now or in the future, it may be necessary to use an input selector switching device in conjunction with an antenna. This device, which connects both to your cable service and your antenna, will enable you to select between cable service and off the air television signals. You may already have such switching capability either in a separate device or as a built in feature of your television receiver. If you already have this capability you do not need an additional switch. However, if you do need the switch, Arlington Cable Partners (MetroCable TV) will install one at a cost of $39.95 or will provide you a switch with written self-installation instructions at a cost of $14.95. Such switches are also available from other local suppliers. A wide range of switching options is available, including, but not limited to, mechanical, electronic, multiple input, and remote control switches which can be adapted to fit most needs.

Please direct any questions to the MetroCable Customers Service manager at 841-7700.

If you wish to obtain an input selector switch, check the appropriate box below and return to our business office at 2707 Wilson Blvd., Arlington, Virginia 22201.

[ ] I wish to have an input selector switch installed. I understand that I will be charged $39.95 for this service.

[ ] I wish to receive an input selector switch with installation instructions. I understand that I will be charged $14.95 for this service.

Please print your name, address and phone number in the space provided below.

_____

_____

_____